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No. 01-534

Supreme Court, U.S.
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In The
Supreme Court of the United States

HUGH F. O'DONNELL
and
CLIENT CENTERED LEGAL SERVICES
OF SOUTHWEST VIRGINIA, INCORPORATED,

Petitioners,

v.

JOHN EIDLEMAN, JOHN MCKAY
and
LEGAL SERVICES CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners have filed a Petition for Writ of Certiorari. On October 26, 2001, Respondents filed a Brief in Opposition. This Brief replies to that effort.

ARGUMENT

I. Respondents' Brief in Opposition is Factually Inaccurate

In their Brief at p.i , Respondents describe the question presented as whether a "former recipient" of grants from the Legal Services Corporation has an implied right of action "to challenge the Corporation's decision to change the geographical boundaries of the service areas for which it provides grants." This description is erroneous.

First, when Petitioner CCLS brought this action in February 2000, it was not a **former** recipient of LSC funding but a **current** recipient trying to maintain quality and level of services by adjusting to the competitive regime which Congress had required when it enacted the 1996 Appropriations Act. *See* Pub.L.104-208, 110 Stat. 3009 (1996). As its guide for surviving in the new competitive environment, CCLS had the mistaken belief that the regulations which the LSC Board had promulgated after notice and comment ought to trump the desires of LSC managers for fewer and bigger programs. See 45 C.F.R 1634. Because it saw a conflict between what the regulations said publicly and what LSC bureaucrats were doing covertly, there was no choice but to seek judicial guidance.

Second, although CCLS did challenge the decision of LSC bureaucrats to summarily abandon the "service areas" which had been defined and used for three rounds of competition in favor of a new "service area" equal in area to New Jersey, its challenge was broader. Besides challenging the new "service area" which LSC created in Southwest Virginia, CCLS also challenged the decisions of the LSC

president to arbitrarily shorten the term of the CCLS grant for the sole purpose of insuring that the new service area could be imposed sooner than later. Petitioner O'Donnell also specifically challenged the LSC requirement of a "statewide perspective" as inconsistent with his own fiduciary duty of service to the people of the coalfields.

Besides wrongly narrowing the scope of the CCLS challenge and the program's status as a current recipient at the time of the challenge, Respondents' brief also misstates the history of this case. The Brief states at p. 3 that the court of appeals "affirmed" and cites Pet. App. 4 as evidence of that affirmance. Turning to the reference cited, one finds that the court of appeals did not affirm the decision of the trial court but instead vacated the earlier decision and remanded it with instructions.

Although the fact is absent from Respondents' brief, the lower court's decision conflicts with the trial court on the central issue of whether judicial scrutiny ought to be available for LSC grantees directly and significantly affected by LSC conduct. In its bench decision, the trial court reached the merits of the case by specifically concluding that the decision of the Fourth Circuit in *Regional Management Corporation, Inc. v. Legal Services Corporation*, 186 F3d 457 (1999) could be distinguished because the plaintiff in that case was not an LSC grantee. Pet. App. 8. In reaching its decision, the trial court also noted that "defendants do not contend that all judicial review is barred." Pet. App. 8.

In asserting their current position barring judicial review of LSC decisions directly affecting the funding of grantees, Respondents obviously minimize the anomalous aspects of the lower court decision. Not only did the lower court overrule the trial court, there are at least three circuit court decisions reaching the conclusion that LSC decisions affecting grantees are subject to judicial review. Respondents claim that none of those decisions conflict with the decision here. Their effort to paper over these conflicts, though strenuous, is simply not persuasive.

For example, Respondents claim *Texas Rural Legal Aid v. Legal Services Corp.* 940 F.2d Corp. (D.C. Cir. 1991) is not in conflict. According to Respondents' Brief at p. 7, that case may be distinguished from the case here because it placed "direct limits on the expenditures of LSC funds by grantees. Here, in contrast, LSC's decision to reconfigure service-area boundaries did not place any direct limitations on grantee expenditures or otherwise regulate their conduct."

The distinction makes no sense. As noted earlier, Petitioners challenged not only the sudden creation of a new service area the size of New Jersey, but also the arbitrary shortening of the grant term from three years to one year. To suggest that the two decisions had no "direct" consequences on CCLS operations is clearly erroneous. As a result of the arbitrary shortening of the grant term, CCLS was forced into another round of "competition" two years sooner than would have otherwise occurred. As a result of the re-definition of a service area which was composed of three former service areas, the competitive posture of CCLS was also radically altered. The effect of that alteration was to devalue the program's experience delivering services in the coalfields. The ultimate impact of the alleged "competition" was in fact far more severe on CCLS than the impact of the regulation considered in *Texas Rural* since it forced CCLS to change its very identity as a coalfield entity, grounded in coalfield experience.

As Judge Murnaghan noted in his concurring opinion in *Regional Management, Texas Rural* clearly held at 697 that was "nothing in the Act or the Act or legislative history to suggest that Congress meant to insulate LSC's actions from judicial review." Pet. App 30. To the extent that the case at bar finds that the same legislative history and Act insulate LSC conduct toward its grantees from judicial review, there is plainly a conflict between the two cases. Because there is a conflict among the circuits on this important question, this court should act to resolve it by granting the writ.

II. Respondents' Claim Concerning the Impact of LSC Actions On Competition Does Not Withstand Scrutiny

In its bench opinion, the trial court found that LSC had something which the court called "a merger program" and that it was clear that this "is an official policy of the Corporation directed by its chief executive officer." Pet. App. 9 The court also stated that "the plaintiffs contend that the Board of Directors of LSC has not approved this merger program, **but there is no evidence that this policy requires approval of the Board of Directors."** Pet. App. 9

On appeal, Petitioners challenged the trial court's conclusion that the legal question of whether LSC's "merger program" was authorized by statute and regulations was a matter of "evidence." They contended that any evaluation of the legality of "the merger program" has to consider the total statutory and regulatory context including the 1996 Appropriations Act, and that the issue is purely a legal question. Petitioners also contended that the failure of the LSC Board of Directors to use its regulatory power to authorize the "merger program" is problematic.

As previously noted, Section 503 of the 1996 Appropriations Act not only required a system for the competitive award of grants but also required the Corporation to promulgate "regulations" to implement it. Although the LSC Board did in fact respond to statutory directive by promulgating regulations establishing a system for the competitive award of grants at 45 CFR 1634, the "merger program" pushed with fanatic vigor by LSC managers directly opposed the competitive thrust of the appropriations law and implementing regulations. Although Congress obviously intended that "regulations" establishing a competitive regime would be the principal vehicle for shaping and improving legal services, management's "merger program" substituted an alternative vision—one not grounded in regulations . A plain example of this conflict may be found by considering the provisions

of 45 C.F.R. 1 (d) which states that one of the five purposes of such a competitive system is to "Preserve local control over resource allocation and program priorities." It is blatantly obvious that combining three "service areas" into a new service area the size of New Jersey has absolutely nothing to do with preserving "local control" since under the new configuration the power and influence of each locality will be diluted.

In their Brief in Opposition, Respondents admit the "merger program" has "resulted in a decrease in the total number of services areas". Respondents' Brief 2. The irony of this consequence should be noted. Using tools relating to the definition of "service area" and duration of grant term which were supposed to be part of promoting competition and preserving local control, the LSC president has in fact caused a significant reduction in the number of competitive opportunities. He has done so without the benefit of a single Board resolution supporting or directing his conclusion that consolidation not competition was the way to improve the legal services delivery system.

The central question here is whether a program intended by Congress to insert "competition" into the provision of civil legal services can be reconciled with a program which both drastically reduces the number of competitive opportunities and greatly diminishes the possibility of local control of resources. The trial court failed to address this question by any reference to the 1996 Appropriations Law; and the lower court avoids it altogether by insulating the "merger program" from any judicial review.

Is competition aided by a holding which insures that those who are the victims of LSC 's "merger program" lack any recourse to point out the plain conflict between what Congress said and what LSC did ? Although Petitioners appreciate how advocates of "unlimited discretion" might well want to avoid any independent examination of LSC decision-making, upholding the result reached by the lower

court would be a devastating blow for those principles of transparency and predictability which are fundamental to a competitive regime.

Finally, in defense of their claims for "unlimited discretion", Respondents' brief identifies two issues which are worthy of scrutiny. The first is the report which was "ultimately submitted" to LSC and which "proposed reducing" the number of service areas from twelve to six or seven. Respondents Brief.3 Although Respondents would have this court believe that the report was a thoughtful examination of how legal services in Virginia should be re-structured, the truth is less pretty. The "proposal" was the hurried response to instructions by Respondent Eidleman concerning the demands of the LSC president for fewer Virginia programs. Although LSC guidelines called for a broad-based planning process, the proposal emanated from legal services programs who were receiving funds from LSC. There was no involvement in the report by the judiciary, local bar associations or other groups interested in the welfare of low income people. Although the trial court found that "whether there were sufficient stakeholders involved is not legally relevant" Pet. App. 9, the narrow range of authorship is a good index of the proposal's lack of authenticity and the high level of intimidation involved in its creation. Under presidential threat of a single statewide program, programs did what they were told and produced a report which could be used by LSC to justify its action.

The other issue appears on p. 9 of Respondents' Brief. This is the claim that LSC's decision to consolidate service areas "had the salutary effect of creating competition." The reference here is to the fact that shortly before the trial of the case, the executive director of the Southwest Virginia Legal Aid Society, Larry Harley, announced that Southwest was going to "compete" against CCLS and the New River program for the new service area. As a consequence of this conveniently timed announcement which occurred weeks before the deadline for proposals, at

trial LSC claimed that there was nothing "anti-competitive" about what LSC was doing since there was now "competition" in Southwest Virginia for the first time. Looking beyond the competitive facade of this claim reveals a village only Potemkin could love. First, Harley's pre-trial announcement of his intent to compete does not change the reduction in the number of competitive opportunities nor the diminution of local control. Instead of three chances for a new entity to seek a grant for delivery of legal services in Southwest Virginia, there was now only one. Moreover, the enormous size and heterogeneous nature of the new service area present a more significant challenge for any possible new competitor. Second, although unmentioned in Respondents' Brief, the relationship between Harley and LSC managers at the time of the announcement and thereafter was something other than the arms'-length course of dealing which might be expected in a genuine competition. The week before trial, Respondent Eidleman testified at a deposition that he had not provided any advice at all to Harley concerning the competition with CCLS and the New River program. In admissions received by Petitioners the weekend before the Monday trial, LSC admitted that contrary to Eidleman's testimony, both he and Bob Gross, the LSC official in charge of state planning, had provided advice to Harley. Although Respondents claim that the "competition" in Southwest Virginia was "created" by the LSC decision to consolidate three areas into one, the decision which created the competition was in fact the Harley decision. Given LSC's advisory relationship with the Southwest director and LSC's litigational interests in showing the trial court how consolidation of service areas was really "competitive", the LSC claim that consolidation" created "competition" is dubious. Harley's decision to help out his "advisors" by giving them an argument they could use does not change the fundamentally anti-competitive nature of LSC's "merger program."

CONCLUSION

For the reasons previously stated, this court should grant the writ of certiorari. The decision of the Fourth Circuit is inconsistent with the decisions of all other circuits which have considered the issue of whether LSC's conduct toward its grantees should be insulated from judicial review. The LSC "merger program" is in fundamental conflict with the statutory and regulatory scheme which Congress mandated. Because this case is the only extant legal challenge to that "merger program", it presents a unique opportunity to re-establish the principle that statutes should not be undermined by bureaucratic fiat.

Respectfully Submitted,

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